

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF RHODE ISLAND

3
4 * * * * * C.A. NO. 00-105L

5 ESTATE OF YARON UNGAR, et al

6 VS.

7 JULY 30, 2003

8 11:00 A.M.

9 THE PALESTINIAN LIBERATION
10 ORGANIZATION, et al

11 * * * * * PROVIDENCE, RI

12 BEFORE THE HONORABLE RONALD R. LAGUEUX,

13 SENIOR DISTRICT JUDGE

14 (Objections to Magistrate's Orders)

15 APPEARANCES:

16 FOR THE PLAINTIFFS: DAVID J. STRACHMAN, ESQ.
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22 U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND

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ORIGINAL

KAREN M. ZINNI, RPR-RMR-CRR

1 30 JULY 2003 -- 11:00 A.M.

2 THE COURT: Good morning, everyone. The matter
3 before the Court is Civil Action 2000-105L, the Estate
4 of Yaron Ungar and others versus The Palestinian
5 Authority and others. The matter is here on four
6 appeals or objections to orders entered by the
7 magistrate judge.

8 The first one is an objection to an order
9 granting Plaintiffs' motion to strike all of these
10 objections and appeals by the PA Defendants. The
11 second one is the PA Defendants' objection to a
12 memorandum and order granting Plaintiffs' motion to
13 enter default. The third one is the PA Defendants'
14 notice of appeal from an order continuing hearing on
15 motions for default judgment. And finally, the PA
16 Defendants have filed a notice of appeal of a denial of
17 Defendants' motion for a protective order against
18 depositions.

19 I will hear those four matters. And rather than
20 take them separately, I'll hear arguments on them as a
21 whole. Will the attorneys identify themselves for the
22 record, please.

23 MR. STRACHMAN: David Strachman for the
24 Plaintiffs.

25 MR. SCHILLING: Lawrence Schilling for the

1 Defendants, your Honor.

2 MR. SHERMAN: Deming Sherman for the Defendants.

3 THE COURT: All right. I'll hear from the PA
4 Defendants on each one of these appeals or objections.

5 MR. SCHILLING: Thank you, your Honor. If it
6 please the Court, we think it makes sense to consider
7 all of these objections as a whole because they have
8 common issues.

9 THE COURT: That's right. I want to save time.
10 I want to save time instead of rehashing on each one.
11 So you can make your full arguments on each one of
12 these orders.

13 MR. SCHILLING: The essential source of problem
14 is the --

15 THE COURT: Please speak into the microphone.

16 MR. SCHILLING: -- is the importance to the
17 Defendants of their claim of sovereignty and the
18 doctrine that they should not be required to bear the
19 burdens of litigation, specifically in this case
20 required to answer or required to make discovery, until
21 there's a final determination of their right to
22 immunity and related issues. This is not new.

23 And the second factor, and it's a matter of
24 great concern, is the disruption, the possible
25 disruption of the peace process and the roadmap

1 negotiations that are ongoing that might occur if there
2 was -- if the action moved forward.

3 And the third factor is the difficulty that the
4 Defendants face in making discovery and appearing for
5 depositions. It's difficult, if not impossible. The
6 Plaintiffs go on and on about the urging litigation
7 over the difficulty of the conditions. We think that
8 this is perhaps a -- it's important, but it's a
9 secondary issue because the basic concern here that the
10 Palestinian government has is in protecting itself and
11 preserving the rights of its people, millions of
12 people, and in moving forward in a constructive way
13 with the peace process.

14 The orders come up in the context, I think your
15 Honor's familiar with them, but I'll just mention them
16 briefly. There was a hearing before your Honor on
17 April 11th, and at that hearing your Honor indicated
18 that the Defendants' motion for reconsideration of the
19 order to -- the denial of the motion to dismiss would
20 be forth -- would be denied.

21 An order issued on April 22nd, and we appealed
22 on that day, took an interlocutory appeal to the First
23 Circuit. So that the first of the orders that's at
24 issue here was issued prior to the appeal, and the --
25 the first two were on April 18th. The appeal was on

1 April 22nd.

2 The May 14th order was issued while the appeal
3 was pending, and indeed we applied to the magistrate at
4 a hearing on May 14th that the hearing be continued
5 until after the appeal. The magistrate denied that
6 motion, and he issued one order, the May 14th order, on
7 the same day; and he issued the May 27th order which
8 was discussed at the May 14th hearing on the 27th.

9 And also on May 27th the Court of Appeals
10 rendered its judgment. It's a short judgment. The
11 Court of Appeals was aware that the May 14th order had
12 been entered. We filed a designation, the rules of
13 appellate procedure when a motion for a stay is
14 pending, and we moved for a stay on the same day that
15 we filed an appeal, parties can designate for filing in
16 the Court of Appeals the -- any documents in the
17 District Court.

18 So we had the May 14th order called to the
19 attention of the Court of Appeals, and the Court of
20 Appeals rendered a decision that's susceptible of
21 several interpretations; but pursuant to the Court of
22 Appeal's judgment, we read it to suggest that a
23 properly supported Rule 12(b)(1) motion could be filed.
24 The judgment says, "They have not yet answered the
25 Complaint, and we do not discount the fact that they

1 may still be able to file a properly supported
2 Rule 12(b)(1) motion below. This seems especially
3 likely given the jurisdictional implications of the
4 issue and the Appellee's characterization of the
5 Court's immunity ruling as interlocutory."

6 And they also went on to say, "This order is
7 without prejudice to the Appellants raising their
8 sovereign immunity defense in a proper and timely
9 manner. We take no view as to the merits of that
10 defense."

11 At the time they wrote this, the Court of
12 Appeals was aware, or at least had before it, the fact
13 that the magistrate had entered a default with respect
14 to the lack of an answer.

15 I mention these things, your Honor, because
16 they -- we filed a properly supported motion on
17 June 13th. I think Mr. Strachman's objection, I'm
18 assuming he will object, is due tomorrow; and we
19 consider the motion to be extremely important, and it
20 provides a further basis for our urging, as we have
21 been urging all along, that the grounds with which I
22 began and the importance to the Palestinian government
23 and people of their immunity defenses and the -- and
24 their right to be free of the burdens of litigation
25 until there's a final determination of the issue.

1 I think that's pretty much what I have to say,
2 your Honor. The arguments that the Plaintiffs go on
3 about are, I think, not central to this basic ground of
4 our concern. With respect to the May 14th order, I
5 think that the Plaintiffs make a number of
6 misstatements or exaggerations about the -- what the
7 papers have to say about the relationship between the
8 Palestinian government and Hamas.

9 At the time that the papers were being written,
10 there was a front page discussion of the negotiations
11 that were going on between the Palestinian government,
12 and that would be Prime Minister Abbas, and Hamas about
13 the cease-fire. And it was crucial to the roadmap
14 going forward that there be some progress made in this
15 area, and that's what we referred to specifically in
16 our papers.

17 And we said that the -- this case and the
18 discovery being sought has at its heart a subject that
19 is crucial to the acceptance and initial implementation
20 of the roadmap, the relationship between the
21 Palestinian Authority and Hamas. And we were referring
22 here to these ongoing negotiations, which were front
23 page news and which are extremely important.

24 The Plaintiffs, I think, have mistakenly
25 characterized this as what they say is the relations

1 between the Palestinian government and Hamas are at the
2 heart of this case, as the Defendants themselves
3 candidly admit. I think that's -- that overstates the
4 matter and that we were simply referring to the
5 cease-fire negotiations that were going on.

6 The Plaintiffs also make an argument that
7 because there was a lack of objection to the
8 magistrate's earlier order on discovery, I think it was
9 in January, that there's some sort of a waiver of the
10 points that are being raised. I think there's nothing
11 to that.

12 They cite a case which, in fact, points out that
13 the preclusion of the argument occurred in a
14 situation -- this is the *Sunview* case, your Honor,
15 which Plaintiffs cite in their response to our
16 May 14th submission. And the Court said that *Sunview*
17 never sought to have the District Court review the
18 magistrate's ruling, and so it couldn't be reviewed on
19 appeal.

20 I think the matter of discovery, which is the
21 subject of these orders, is fully before the Court and
22 has been raised and that there's no merit at all to the
23 Plaintiffs' argument that there's been a waiver which
24 is irreversible. That's it, your Honor.

25 THE COURT: All right. Mr. Strachman?

1 MR. STRACHMAN: Thank you, your Honor. The
2 Plaintiffs -- excuse me, the Defendants would have us
3 now stop this litigation 40 months after it began,
4 after two motions to dismiss were denied, after the
5 First Circuit said this case was going forward, after
6 your Honor has repeatedly said it's going forward,
7 after discovery orders that said it granted them time
8 after time to comply, and all because now, last month,
9 they filed a new third motion to dismiss the case on
10 issues that Mr. Clark himself identified as being
11 crucial issues but he never fully briefed in his four
12 previous attempts to dismiss the case.

13 And I say four because there was the initial
14 motion to dismiss. When we argued before your Honor in
15 September of 2000, your Honor suggested that the
16 Defendants submit an additional brief on the issue of
17 jurisdiction. They did so, and we filed an Amended
18 Complaint. They moved to dismiss that. That was their
19 third attempt. And then they filed a motion for
20 reconsideration.

21 In each of those four motions, they had an
22 opportunity to raise issues which they now say are
23 crucial and which should bring this 40 months of
24 litigation to a crucial halt. The problem is, when
25 Mr. Clark himself filed the motion for pro hac vice for

1 admission into this Court, he identified these very
2 issues. He said this was a crucial issue, whether the
3 PA -- whether the PLO is a state. They chose not to
4 raise these issues four previous times. Now they have
5 litigation stopped because of their own methods and
6 strategies of litigation.

7 The First Circuit said that was improper. The
8 First Circuit said they have to comply with the rules
9 like all other litigants. In the meantime, there are
10 several things that have happened. First, Judge, in
11 terms of the motion to strike, your Honor granted a
12 similar motion to strike admonishing the Defendants not
13 to provide scurrilous materials in the pleadings and
14 personal attacks on people who aren't even attorneys in
15 this case. In fact, in one instance the attack was on
16 the husband of a woman who was a lawyer who's not
17 involved in this case.

18 The Court admonished the Defendants not to
19 continue that conduct. Judge Martin admonished them
20 similarly in his order, and that type of attack has no
21 place in this litigation. It's entirely inappropriate,
22 and I would ask your Honor to adopt the same type of
23 ruling that you did when you heard this matter, I
24 believe it was, on April 11.

25 In terms of the motion to enter default, as the

1 Defendants were aware, and it was explicitly pointed
2 out to them, when this Court rendered a decision on the
3 motion to dismiss the Amended Complaint on November 4,
4 the rules say they have 10 days to file an answer. We
5 waited, I believe, 150 days to file a motion to
6 default.

7 After now six months, they still have not filed
8 an answer. They refuse to file an answer. And the
9 kicker, Judge, is that when we were before Judge
10 Martin, Mr. Clark said very honestly and I think very
11 frankly, he informed the Court on page 6 of the
12 transcript of April 1, he said very clearly, I met with
13 Mr. Arafat. I traveled to Ramallah in December after
14 your Honor's ruling. I went primarily for the purpose
15 of discussing this case and some parallel cases, but
16 primarily this case. And he says, quote, "My
17 instructions have been, 'Do not answer.'" That's what
18 he heard on December 15 or December 16 in his meetings
19 with Mr. Arafat and the senior leadership of the PLO.

20 He also said in his response to our motion to
21 default, quote, "Drafting and filing an answer is
22 within Defendants' limited capabilities, though
23 inadvisable." So basically they're saying this
24 litigation is going to come to a halt because people
25 who live in another country, who are not here before

1 the Court, his own clients, don't want to comply with
2 the rules and don't want to comply with the Court
3 orders and the requirements of litigation in this case.

4 They cite a letter from a Mr. al-Kidra, who
5 apparently is some sort of employee of the PLO or PA in
6 New York. It's unsigned. It's unsworn. Judge Martin
7 said it's inadmissible; and even though he reviewed it,
8 he said it provides no basis for not filing an answer.

9 By the way, your Honor, now several months later
10 we still don't have an answer. So 40 months into this
11 case, seven or eight months after you ruled on
12 November 4, they still refused to file an answer.

13 In terms of the May 14, '03, order which they
14 have appealed, Judge, it's somewhat shocking that they
15 would appeal such an order because in that order we
16 asked Judge Martin to enter default that day. And
17 Judge Martin, as a matter of providing every possible
18 courtesy to the Defendants, gave them an additional two
19 months to comply with discovery obligations. And he
20 said you can have until July 14, and I believe it was
21 July 12 or July 13 we received a letter from opposing
22 counsel saying they're not going to comply.

23 So I don't know how you can file -- how you can
24 appeal an order giving even more time to do what you
25 were supposed to do back in December.

1 And in terms of the May 27 motion for protective
2 order, in December we argued a motion to compel. On
3 January 14, an order entered. That order, by the way,
4 your Honor, took a month to enter because Mr. Schilling
5 and I had several drafts back and forth to make sure it
6 complied exactly with what Judge Martin wanted. And
7 except for one tiny difference, we submitted virtually
8 identical orders.

9 That order told them they have to comply with
10 discovery. They have to present witnesses on 30 days'
11 notice. It also, most importantly, said if they can't
12 present the witnesses, if they can't comply with the
13 discovery, the interrogatories, the Request for
14 Production of Documents and the Request for Admissions,
15 they could object and they could file proper objections
16 item by item and say why they wanted to object.

17 Instead of doing that, several months later they
18 file a request for protective order effectively trying
19 to undermine what Judge Martin already did. They can't
20 do that, and the law of the case is that they must
21 comply. Under Rule 72, they've got to take an appeal
22 within 10 days of the entry of the January 14 order.
23 They never did that. They never appealed.

24 So they attempt to make a back-door attempt to
25 undo that order. And what's most egregious is, instead

1 of coming to us and saying to us, Look, we can't bring
2 this person but we could bring somebody else, I can't
3 give you these documents but here are the documents we
4 can bring, I can't answer these admissions but I can
5 answer these, they make absolutely no attempt to
6 respond in any way, and they're very frank about that.

7 In repeated hearings before this Court and
8 before Judge Martin, Mr. Clark has said he's been
9 instructed not to respond to discovery, and he told
10 Judge Martin that again two weeks ago at the hearing
11 that we had.

12 Under Rule 26, they have a duty to confer with
13 us, to ask us to engage in a discussion as to how
14 they're going to comply, whether they can comply,
15 whether there can be alternatives to the location or
16 method of depositions, et cetera. Absolutely refused.
17 I went out of my way three weeks in advance of the
18 March 31 commencement date of the depositions to write
19 a letter to my brothers and say, Are they coming? You
20 know, can we discuss this? Is there a way to handle
21 this? Because the pleadings that were being filed
22 repeatedly said, We're not complying.

23 So I wrote again saying, What can we do to
24 facilitate that? Absolutely no response, and then the
25 absolute kicker. On the very first day that the

1 depositions were supposed to begin in this court
2 pursuant to -- in this jurisdiction pursuant to Judge
3 Martin's order, the PA refused to produce anybody; but
4 what they did do is in a case in Washington called
5 the Bucheit case, they brought a senior official to
6 Washington. He took depositions that very same day,
7 and two days later he appeared at a trial in Washington
8 as well, a case that the PA and the PLO are defending
9 actively, have answered and provided discovery,
10 complied with Court orders for discovery and
11 participated.

12 So what we have is very selective participation
13 in litigation, and we have a blatant disregard for the
14 repeated orders of this Court and repeated suggestions
15 by your Honor and by Judge Martin that this case is not
16 a political case. It's not run by political parties on
17 behalf of the Plaintiff. It's run by human beings who
18 were killed and whose families were killed and simply
19 want to move forward after 40 months.

20 I have provided to the Court, I think several
21 times, in the Bucheit case a deposition of Mr. Ghassan
22 Ramadan who testified. I also provided to the Court
23 another deposition transcript or a transcript of a
24 hearing that occurred in Jerusalem at the very same
25 time, March of 2000, when the PA is producing all kinds

1 of witnesses to court in Jerusalem.

2 So to say they can't do this is very selective.
3 They refused to comply with this Court's orders. In
4 other countries, in other jurisdictions, they're
5 perfectly willing to comply. And I think finally after
6 40 months this -- these pleas have to fall on deaf ears
7 because they're basically saying we're coming to the
8 end of the litigation, we're not going to participate.

9 So in light of that, Judge, last week we made
10 two requests of the Court. We asked the Court to
11 consider their motion, their third -- the motion for
12 entry of default judgment, which they have not
13 responded to. We've asked the Court to rule on that
14 and determine that pursuant to Rule 12(a)(2) of the
15 local rules that it's deemed granted because they
16 failed to respond.

17 Your Honor gave them two additional periods of
18 time to file answers. Then they file a motion saying
19 we don't want to respond, we want to wait indefinitely
20 to respond. And in that time your Honor referred that
21 matter to Judge Martin, who scheduled a hearing on
22 August 15th. They still haven't responded, even though
23 it's on the calendar for August 15.

24 Additionally, your Honor, in terms of the Report
25 and Recommendation that Judge Martin gave on July 3

1 concerning the entry of default judgment against Hamas,
2 the 10-day appeal period or objection period ended last
3 Monday. And on Tuesday we filed with the Court a
4 request for entry of final judgment as well as proposed
5 final judgment, and the Court's --

6 THE COURT: I'm going to deal with that at the
7 end. That requires a motion on your part, and I'll
8 deal with that.

9 MR. STRACHMAN: Thank you, your Honor.

10 THE COURT: Let me deal with these matters
11 seriatim. The first objection was to an order granting
12 Plaintiffs' motion to strike certain material contained
13 in memoranda. This order was entered by Judge Martin
14 on April 18th, 2003. Prior to that, I had granted the
15 same motion to strike the material in a memorandum that
16 was filed before me. This is a personal attack on
17 counsel in Israel which I pointed out has no relevance
18 to this case.

19 Judge Martin granted the motion to strike in the
20 memorandum filed before him. It is entirely
21 appropriate to strike that scurrilous and scandalous
22 material. That is totally irrelevant to this case.
23 Therefore, I affirm Judge Martin's granting of the
24 motion to strike on April 18, 2003.

25 The key motion here is a motion or really an

1 appeal from an order by Magistrate Judge Martin
2 granting Plaintiffs' motion to enter default against
3 the PA Defendants. The PA Defendants are in serious
4 default in responding to this case.

5 After motions to dismiss were denied, the
6 Defendants had an obligation to answer this case. It
7 is an absolute requirement of the Rules of Civil
8 Procedure that they answer this case. They have
9 refused to do it. In fact, by admission of Mr. Clark,
10 they have been ordered by the Defendants not to answer
11 this case.

12 I pointed out some months ago that in order for
13 the Defendants to raise the defense of sovereign
14 immunity, they had to file an answer setting out the
15 affirmative defense of sovereign immunity and then move
16 to have an early hearing on that matter. They failed
17 to file the answer. Therefore, they are in default.
18 They've default in this case.

19 The only issue that now remains for the Court to
20 decide in this case is the amount of damages that
21 should be assessed against these Defendants. Pure and
22 simple, that's where this case is, right here and now.
23 Therefore, the magistrate judge's order for the clerk
24 to enter default against these Defendants is affirmed.

25 The next matter is a notice of appeal of Judge

1 Martin's order continuing hearing on motions for
2 default judgment. Judge Martin gave these Defendants
3 additional time to comply with discovery, but that is
4 academic at this point. All discovery is academic in
5 this case because the Defendants are defaulted. And
6 the only thing that remains to be done, to reiterate,
7 is the entry of judgment against these Defendants after
8 a determination of the amount of damages sustained by
9 these Plaintiffs.

10 Therefore, the order continuing the hearing on
11 the motions for default judgment is affirmed, and I
12 leave it up to Judge Martin to schedule a hearing on
13 proof of claim for the entry of judgment against these
14 Defendants and to make a determination of the amount of
15 the judgments and to make a Report and Recommendation
16 to me as to what the amount of judgment should be, as
17 he had done in the Hamas part of this case. So to
18 reiterate, this order continuing the hearing is
19 affirmed.

20 It's for the benefit of the Defendants, but they
21 haven't complied with discovery in any event. So now
22 there are really two grounds for the entry of default,
23 not only the failure to file an answer in this case but
24 failure to provide discovery.

25 The final notice of appeal relates to the order

1 of the magistrate judge denying Defendants' motion for
2 a protective order against depositions. As I've
3 indicated, this matter is now academic. There will be
4 no depositions because the Defendants are in default.
5 There is no need to have depositions at this point
6 unless Plaintiff makes a showing that it is necessary
7 to have depositions in order to determine damages in
8 this case. So clearly the Defendants are not entitled
9 to a protective order against depositions at this stage
10 of the proceedings because the matter is academic.

11 To keep the record straight, I affirm the
12 magistrate judge's denial of the motion for a
13 protective order so as to advise him that I am in
14 complete agreement with the way he's been handling this
15 matter at the magistrate judge's level. So prepare an
16 order, Mr. Strachman, on these four matters.

17 MR. STRACHMAN: Yes, your Honor.

18 THE COURT: Now, this only concerns Plaintiffs'
19 counsel at the moment. The magistrate judge has issued
20 a lengthy and very thorough Report and Recommendation
21 on the liability of the Hamas. I've read it
22 thoroughly, and I intend at some point to issue an
23 order adopting that Report and Recommendation and
24 publishing it; but before I can enter judgment, there
25 are two things that I will require.

1 First of all, it's necessary for the Plaintiffs
2 to make a motion under Rule 54(b) for the entry of
3 judgment at this stage because it does not resolve the
4 whole case. The Court has to make a certification that
5 there is no just reason for delay in entering a
6 judgment against some of the parties and not all of the
7 parties.

8 So I advise Plaintiffs' counsel to consult with
9 the authorities on that subject and make an appropriate
10 motion for the entry of judgment. And that motion will
11 be made to me, and I will hear it.

12 There is one small flaw in the magistrate
13 judge's Report and Recommendation. He recommended that
14 I impose prejudgment interest, but he did not state
15 what the source of that rule of law is in this case and
16 what the amount of prejudgment interest should be. And
17 so I want Plaintiffs' counsel to educate me on what the
18 proper rate of prejudgment interest should be in cases
19 of this kind, federal cases based on federal question
20 as opposed to diversity cases.

21 The Court usually looks to some federal statute
22 that establishes what prejudgment interest should be.
23 In the absence of a federal statute, then the question
24 arises whether the Court should look to the statute of
25 the forum state or choose a rate of interest that is

1 reasonable under the circumstances.

2 For example, in admiralty cases, there is no
3 statute that provides for prejudgment interest; and
4 since admiralty is a federal matter, the Court is
5 authorized to choose a rate of interest that is fair
6 and reasonable under the circumstances. And that's
7 what I have done in admiralty cases, and it may well be
8 that that is the rule of law that applies to this case.

9 But I want to be educated on that subject. So
10 before I take any further action on that Report and
11 Recommendation, I will expect to receive a motion from
12 Plaintiffs' counsel.

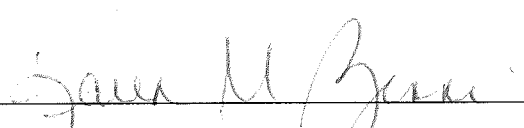
13 MR. STRACHMAN: Thank you, your Honor.
14 Certainly.

15 THE COURT: All right. Is there anything
16 further we should discuss? All right. Hearing none,
17 then, the Court will take a recess.

18 (Adjourned)
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C E R T I F I C A T I O N

I, Karen M. Zinni, RPR-RMR-CRR, do hereby
certify that the foregoing pages are a true and
accurate transcription of my stenographic notes in the
above-entitled case.



Karen M. Zinni, RPR-RMR-CRR



Date

KAREN M. ZINNI, RPR-RMR-CRR